89-964

Supreme Court, U.S.
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No.

IN THE

Supreme Court Of The United States

October Term 1989

RAYMOND J. MOSKAL

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to The United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the opinion of the United States Court of Appeals for the Third Circuit which affirmed the petitioner's conviction conflict with an earlier decision of the United States Court of Appeals for the Tenth Circuit upon which the petitioner was entitled to rely in the presentation of his defense to certain criminal charges?

PARTIES INVOLVED

The following individuals appeared as defendants at the District Court and as appellants in the Court of Appeals: Raymond J. Moskal, Alvin C. Davis and Dennis H. Smith.

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v.

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to The United States Court of Appeals for the Third Circuit

Petitioner Raymond J. Moskal prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on October 18, 1989, affirming his conviction for securities fraud in violation of 18 U.S.C. 2314.

OPINION BELOW

The United States Court of Appeals for the Third Circuit[1] issued an opinion on October 18, 1989, which affirmed the petitioner's convictions in all respects. The opinion has not yet been reported but is scheduled to appear at 888 F.2d 283. The opinion and judgment are attached to this petition in Appendix A.

[1]The decision was rendered by a panel of judges assigned from the Second Circuit sitting by designation pursuant to 28 U.S.C. 291.

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was issued on October 18, 1989. This Court has jurisdiction pursuant to 28 U.S.C. ~~1257~~. 1254.

STATUTES INVOLVED

The petitioner was convicted of violation of 18 U.S.C. 371; 18 U.S.C. 513 and 18 U.S.C. 2314. Jurisdiction for review by the Court of Appeals for the Third Circuit is 28 U.S.C. 1291. The substantive criminal statutes are reproduced in Appendix B at page 1

STATEMENT OF FACTS

Petitioner seeks review of the October 18, 1989, decision of the United States Court of Appeals for the Third Circuit which affirmed his convictions. Petitioner submits that the opinion below which affirmed his convictions is in direct conflict with a prior decision from the Tenth Circuit and upon which he relied in the formulation of his defense.

On September 13, 1988, a five count indictment was filed in the United States District Court for the Middle District of Pennsylvania which alleged that the petitioner and two others (Alvin C. Davis and Dennis H. Smith) conspired between themselves and others to violate 18 U.S.C. 513 (Counterfeit Securities) and 18 U.S.C. 2314 (Transportation of Fraudulent Securities) in the context of a wholesale used car dealership located in Manheim, Pennsylvania. The indictment alleged that the conspiracy took place between December of 1984 and July of 1985 and involved the rollback of used car odometers and the subsequent "washing" of titles through the use of title transfers in the Commonwealth of Virginia and State of Pennsylvania.

In the conspiracy count (Count 1), the government alleged that high mileage used cars were bought by the defendants and others for the purposes of turning back the odometers and obtaining new titles that reflected the lower mileage. The cars were then sold to unknowing customers at a higher price than could be obtained for vehicles of such mileage.

The government alleged that the low mileage titles were obtained by a title washing scheme which relied upon original titles altered in Pennsylvania by co-conspirators and sent to additional co-conspirators in Virginia. Once in Virginia, these individuals (who were not then on trial) would apply for new Virginia titles which, when issued, reflected the lower mileage of the original altered documents. The new Virginia titles were then returned to the wholesale used car dealership at which the petitioner was employed in Manheim, Pennsylvania, where the car was then sold to a retail Pennsylvania used car dealer and a Pennsylvania automobile title subsequently obtained.

On January 12, 1989, the jury returned a verdict of guilty on all counts. Both co-defendants Smith and Davis were also found guilty on all counts. On March 20, 1989, the petitioner was sentenced to a term of six months.

On October 18, 1989, a panel of judges sitting by designation for the Third Circuit Court of Appeals, affirmed the petitioner's convictions in all respects. A copy of that decision is attached as Appendix A.

REASONS FOR GRANTING THE WRIT

It is undisputed that the government's proof at trial demonstrated that the automobile titles were altered in Pennsylvania by someone other than the petitioner. It was also undisputed that the Virginia titles obtained by the used car dealer in Virginia and sent to the present petitioner were not themselves altered in any way. There was no dispute that the Virginia titles were validly issued, albeit with an incorrect mileage figure. Yet the government indicted the petitioner and his other co-defendants under 18 U.S.C. 2314 for the transportation in interstate commerce of the Virginia titles only. At the close of the evidence, the petitioner objected to the District Court on the grounds that the Virginia titles were not forged, altered, counterfeited or falsely made. The District Court concluded otherwise and let the case proceed to the jury.

The petitioner challenged that decision as contrary to the holdings of several courts who considered the question, including *United States v. Sparrow*, 635 F.2d 794 (10th Cir. 1980). *cert. denied*, 450

U.S. 1004 (1981) The decision of the Third Circuit acknowledges the holding of *Sparrow*, but concluded that the "better rule" is represented *United States v. Cotoia*, 785 F.2d 497 (4th Cir. 1986) and *United States v. Daly*, 716 F.2d 1499 (9th Cir. 1983), *cert. denied*, 465 U.S. 1075 (1984). Petitioner disagrees.

Section 2314 of Title 18 of the United States Code provides that:

> Whoever with unlawful or fraudulent intent transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered or counterfeited...
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Petitioner asserts that the transportation of the Virginia titles for which he was convicted does not qualify as "falsely made, forged, altered or counterfeited" document within the meaning of Section 2314. While the Petitioner admits that these titles may have contained incorrect mileage figures and that the presence of such a figure may be violative of various state or federal statutes (none of which he was charged with), petitioner believes that the interstate transportation of such titles does not violate Section 2314.

The Third Circuit appears to have adopted the rationale that an item is fraudulent if it contains a single error that is present for whatever reason and regardless of the authenticity of the actual document.Petitioner suggests that such a brush is far too broad.

The first court to petitioner's knowledge to consider this question under nearly identical circumstances agreed that the interstate transportation of valid automobile titles with incorrect mileage statements was not, in itself, a violation of the statute. *United States v. Rudge*, 474 F.Supp. 360 (S.D.Iowa 1979). Significantly, the government never elected to appeal that decision.

Several years after *Rudge*, the lOth Circuit considered the same question in *United States v. Sparrow*, 614 F.2d 229 (lOth Cir. 1980). In the initial panel decision, the Court concluded that an automobile title which contained false information as to ownership is a forged or falsely made security. Upon consideration by the full court however,

the convictions of Mr. Sparrow under Section 2314 were vacated because "the certificates of title was duly executed by Oregon officials. The certificate of title itself was precisely what it purported to be. Only the facts underlying the document were false." *United States v. Sparrow*, 635 F.2d 794, 796 (*en banc*) (lOth Cir.), *cert. denied* 450 U.S. 1004 (1981).

In the *Sparrow* decision, the lOth Circuit mentioned several prior cases and contrasted their support for the proposition that a document is not covered within the purview of Section 2314 if, although containing false information, is neither forged nor altered. *See, Marteney v. United States*, 216 F.2d 760 (lOth Cir. 1954) [no violation of Section 2314 although false information on the document]; *United States v. Crim*, 527 F.2d 289 (lOth Cir. 1975), *cert. denied* 425 U.S. 905 (1976) [a false signature rendered the execution of documents false]. *Sparrow* remains today the rule within the lOth Circuit. Had petitioner been charged within the jurisdiction of that Circuit, the indictment would have been dismissed pre-trial.

In considering Section 2314 in the context of other securities, Courts have concluded that the addition of false information to otherwise valid documents does not make the documents "falsely made" and have reversed Section 2314 convictions. *United States v. Massa*, 740 F.2d 629, 646 (8th Cir. 1984); *United States v. Tyson*, 690 F.2d 9 (1st Cir. 1982).

Neither the government at trial nor the Court of Appeals in the present case has ever suggested that altered mileage figures on Virginia titles had any effect on their validity – much less the effects that were present and justified the convictions in the cases relied upon by the Third Circuit to justify the "better rule" conclusion. Petitioner suggests that the better rule is that of *Sparrow* and its reasoning and that the present attempt to introduce a new and broader interpretation of Section 2314 should be examined by this Court.

CONCLUSION

Wherefore, petitioner respectfully prays for the foregoing reasons that the Petition for Writ be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dennis M. Hart, certify that a true and correct copy of the foregoing Petition was served, by mail, with first class postage prepaid, upon the Office of the Solicitor General, United States Department of Justice, Washington, D.C. 20530, this 17th day of December, 1989.

Dennis M. Hart

APPENDIX A

OPINIONS BELOW

Nos. 89-5233, 89-5234, 89-5235

United States Court of Appeals
For the Third Circuit

UNITED STATES OF AMERICA

Appellee,

v.

ALVIN C. DAVIS, JR., DENNIS H. SMITH,
RAYMOND JOHN MOSKAL, SR.,

Appellants.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Crim. Nos. 88-00150-01,
88-00150-02, 88-00150-03)

Submitted Pursuant to Rule 12(6)
September 12, 1989

Before: LUMBARD, CARDAMONE
and MAHONEY, *Circuit Judges**

---

* Hon. J. Edward Lumbard, Hon. Richard J. Cardamone, Hon. J. Daniel Mahoney, U.S. Circuit Judges for the Second Circuit, sitting by designation.

JUDGEMENT

These causes came on to be heard on the records from the United States District Court for the Middle District of Pennsylvania and were submitted pursuant to Third Circuit Rule 12(6) September 12, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered March 22, 1989, be, and the same are hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

October 18, 1989

Certified as a true copy and issued in lieu of a formal mandate on November 9, 1989.

Test:

Chief Deputy Clerk, United States Court of Appeals, for the Third Circuit

FOR PUBLICATION

Filed: October 18, 1989

United States Court Of Appeals
For The Third Circuit

Nos. 89-5233, 89-5234, 89-5235

UNITED STATES OF AMERICA,

Appellee,

v.

ALVIN C. DAVIS, JR., DENNIS H. SMITH,
RAYMOND JOHN MOSKAL, SR.,

Appellants.

On Appeal from the United States District
Court for the Middle District of Pennsylvania
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September 12, 1989

Before: LUMBARD, CARDAMONE and
MAHONEY, *Circuit Judges**
(Opinion filed October 18, 1989)

---

* Hon. J. Edward Lumbard, Hon. Richard J. Cardamone, Hon. J. Daniel Mahoney, U.S. Circuit Judges for the Second Circuit, sitting by designation.

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Appeal from judgments of conviction entered in the United States District court for the Middle District of Pennsylvania (Caldwell, J.) for one count of conspiracy, two counts of interstate transportation of falsely made securities and two counts of utterance of a counterfeit state security.

Judgments affirmed.

PER CURIAM

Alvin C. Davis, Jr., Dennis H. Smith and Raymond John Moskal, Sr. appeal from judgments of conviction entered March 20, 1989 for conspiracy, 18 U.S.C. § 371 (1982), to commit interstate transporta-

tion of falsely made securities, 18 U.S.C.A. § 2314 (West Supp. 1989), and to utter counterfeit state securities, 18 U.S.C. § 513 (Supp. V 1987), and for substantive counts of interstate transportation of falsely made securities, 18 U.S.C. §§ 2314 and 2 (1982), and uttering of counterfeit state securities, 18 U.S.C. §§ 513 and 2 (1982), in the Middle District of Pennsylvania (Caldwell, J.). Davis was sentenced to three years imprisonment and fined $5,000, Smith was sentenced to two years imprisonment and fined $2,500 and Moskal was sentenced to six months incarceration, followed by three years probation and 100 hours of community service. Upon designation by the Chief Justice of the United States, the members of this panel were assigned to serve as a panel of the Third Circuit Court of Appeals for purposes of determining this appeal. *See* 28 U.S.C. § 291(a) (1982). The designation was made following the recusal of the judges of the Third Circuit. Appellate jurisdiction is conferred by 18 U.S.C. § 1291 (1982).

FACTS

Appellants were convicted for conspiring with others to alter the high mileage figures on certificates of title for approximately 300 automobiles and to obtain "washed" Commonwealth of Virginia titles bearing false, low mileage figures for those automobiles. The false mileage figures corresponded with the rolled-back odometer readings found on the instrument panels of the various automobiles.

During the period of the conspiracy from December 1984 through July 1985, appellant Davis was the owner of Al Davis Enterprises, a wholesale automobile dealership located in Manheim, Pennsylvania. Appellant Moskal was Davis' office manager. Appellant Smith, along with Curman "Buddy" Dickens, was one of the principal owners and operators of Buddy's Auto Sales, a wholesale automobile dealership located in Chesapeake, Virginia.

Evidence was presented at trial that Dickens regularly received Federal Express packages containing automobile certificates of title from Al Davis Enterprises in Pennsylvania. Dickens and his wife would then apply for Virginia certificates for those automobiles in the name of their dealership, Buddy's Auto Sales, at the mileage listed on the titles, which had already been altered. A "washed" title is typically

listed in the name of someone other than the true owner and is obtained in a different state than the one that issued the high mileage title. The "washed" Virginia titles were then returned to Davis, sent either by Federal Express or personally delivered by Smith or Dickens. Davis paid Smith and Dickens a fee of $100 per title for this service. Once Davis received the now "washed" Virginia certificates, he distributed them to area dealers who had provided the titles to him, and charged these dealers a fee for the title washing service. Ultimately, the vehicles with the rolled back odometers and "washed" titles were sold to innocent third parties.

The underlying substantive counts in the indictment related to two automobiles, a 1982 Mazda and a 1984 Ford. Davis purchased the Mazda with 72,472 miles on the odometer, obtained a Pennsylvania title in his name with that mileage, and sent the title to Buddy Dickens in Virginia. A "paid" stamp had been placed on the face of the Pennsylvania title concealing the mileage figure of 72,472, and Mrs. Dickens was able to obtain a new "washed" title in the name of Buddy's Auto Sales showing mileage of 42,703 miles the figure that had been entered on the back of the Pennsylvania title. After receiving the "washed" Virginia title to the automobile, Davis executed the back of the title to make it appear as though he had purchased the car from Buddy's Auto Sales. Title to the 1984 Ford was "washed" in a similar manner through the Dickens' operation, with the exception that the mileage was altered on the Maryland title that was used to effect the sale to Davis. Davis sold both cars to one Mark Angelo, who sold the cars to another dealer, John Todak. Todak applied for Pennsylvania titles using the "washed" titles and sold the Mazda to innocent customers.

DISCUSSION

The primary issue on appeal is whether an automobile certificate of title containing false mileage and ownership information constitutes a "falsely made" security under 18 U.S.C. § 2314 (1988). The relevant portion of that statute prohibits anyone "with unlawful or fraudulent intent, transport[ing] in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered or counter-

feited...." Appellants contend that although the "washed" certificates may contain incorrect information, they are not "falsely made" because they were made and issued by the Commonwealth of Virginia and are genuine documents that contain a false statement of fact.

Some courts agree with this proposition, finding that "falsely made" relates to the genuineness of the document, and not the falsity of its contents. *See United States v. Sparrow*, 635 F.2d 794 (10th Cir. 1980), *cert denied*, 450 U.S. 1004 (1981); *United States v. Rudge*, 474 F. Supp. 360 (S.D. Iowa 1979). Other courts hold that documents validly issued containing material false information are "falsely made" for purposes of § 2314. *See United States v. Cotoia*, 785 F.2d 497 (4th Cir. 1986); *United States v. Daly*, 716 F.2d 1499 (9th Cir. 1983); *United States v. Kauffman*, 670 F. Supp. 134 (M.D. Pa. 1985), *aff'd by judgment order*, No. 85-5146 (3d Cir. Oct. 31, 1985); *see also United States v. Mitchell*, 588 F.2d 481 (5th Cir.), *cert. denied*, 442 U.S. 940 (1979).

The latter, we believe, is the better rule. Stated mileage is a material part of a title certificate. The fact that valid title is transferred by the certificate does not vitiate the fraud that is foisted on the unsuspecting customer when the falsely made document is introduced into commerce. *See Cotoia*, 785 F.2d at 501; *Daly*, 716 F.2d at 1509. We have no doubt that "the purpose of the term 'falsely made' was to... prohibit the fraudulent introduction into commerce of falsely made documents regardless of the precise method by which the introducer or his confederates effected their lack of authenticity..." *Mitchell*, 588 F.2d at 484 (quoting *United States v. Huntley*, 535 F.2d 1400, 1402 (5th Cir. 1976), *cert. denied*, 430 U.S. 929 (1977)). Further, the decision in *United States v. Kauffman*, 670 F. Supp. 134 (M.D. Pa. 1985), *aff'd by judgment order*, No. 85-5146 (3d Cir. Oct. 31, 1985), is especially persuasive in resolving this issue in the Third Circuit.

Appellants also contend that their convictions under 18 U.S.C. § 513[1] should be vacated because the state title certificate was not

[1] 18 U.S.C. § 513(a) (Supp. V 1987) provides "Whoever makes, utters or possesses a counterfeited security of a State or a political subdivision thereof or of an organization, or whoever makes, utters or possesses a forged security of a State or Political subdivision thereof or of an organization, with intent to deceive another person, organization, or government shall be fined not more than $250,000 or imprisoned for not more than 10 years, or both."

"counterfeited" as defined in the statute. Section 513 provides that "the term 'counterfeit' means a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety." 18 U.S.C. § 513(c)(1)(1986). Such definition includes a document that has been *falsely made* in its entirety. Having decided, as a matter of law, that the "washed" certificates were "falsely made" under § 2314, there is ample evidence in the record to support the conclusion that appellants caused the Virginia title certificates to be "falsely made" in their entirety under § 513.

Appellants' final contention that the district court's instructions to the jury were inadequate is without merit. The judgments of conviction are accordingly affirmed.

Please file the enclosed opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

STATUTES INVOLVED

§2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value or $5,000 or more; or

[Second through sixth paras. unchanged]

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government. This section also shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of any bank note or bill issued by a bank or corporation of any foreign country which is intended by the laws or usage of such country to circulate as money.

(As amended Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, §§ 7057, 7080, 102 Stat. 4402, 4406.)

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(June 25, 1948, ch 645, § 1, 62 Stat. 701.)

§513. Securities of the States and private entities

(a) Whoever makes, utters or possesses a counterfeited security of a state or political subdivision thereof or of an organization, or whoever makes, utters or possesses a forged security of a State or political subdivision thereof of an organization, with intent to deceive another person, organization, or government shall be fined not more that $250,000 or imprisoned for not more than 10 years, or both.

(b) Whoever makes, receives, possesses, sells or otherwise transfers an implement designed for or particularly suited for making a counterfeit or forged security with the intent that it be so used shall be punished by a fine of not more than $250,000 or imprisoned for not more than 10 years, or both.

(c) For purposes of this section –

(1) the term "counterfeited" means a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety;

(2) the term "forged" means a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents;

(3) the term "security" means-

(A) a note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest coupon, bill, check, draft, warrant, debit instrument as defined in section 916(c) of the Electronic Fund Transfer Act (15 U.S.C. 1693(c) [15 USCS § 1693(c)], money order, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest in or participation in any profit-sharing agreement collateral-trust certificate, pre-reorganization certificate of subscription, transferable share, investment contract, voting trust certificate, or certificate of interest in tangible or intangible property;

(B) an instrument evidencing ownership of goods, wares, or merchandise;

(C) any other written instrument commonly known as a security;

(D) a certificate of interest in, certificate of participation in, certificate for, receipt for, or warrant or option or other right to subscribe to or purchase, any of the foregoing; or

(E) a blank form of any of the foregoing;

(4) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, or any other association or person which operates in or the activities of which affect interstate or foreign commerce; and

(5) the term "State" includes a State of tne United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.

(Added Oct. 12, 1984, P. L. 98-473, Title II, Ch XI, Part D, § 1105(a), 98 Stat. 2144; Nov.10, 1986, P. L. 99-646, § 31(a), 100 Stat. 3598.)